93 FLRR 1-1085

Veterans Administration Medical Center, Phoenix, AZ and AFGE, Local 2382

Federal Labor Relations Authority

SA-CA-20413; 47 FLRA No. 33; 47 FLRA 419

April 16, 1993

Judge / Administrative Officer

Before: McKee, Chairman, Talkin and Armendariz, Members

Related Index Numbers

72.617 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Bargaining Over Impact and Implementation of Change

72.661 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, De Minimis

Case Summary

THE IMPACT ON OUTSIDE EMPLOYMENT HAD TO BE TAKEN INTO ACCOUNT WHEN CHANGING THE WORKING HOURS OF A UNIT EMPLOYEE. The Authority found that the employer violated 5 USC 7116(a)(1) and (5) by unilaterally changing the duty hours of a unit employee without bargaining over impact and implementation. The employer's action in setting back the employee's starting and quitting times by one hour prevented him from reporting to his second job on time. The employer's change directly affected the employee's livelihood. The Authority rejected the argument that there was no bargaining obligation because the effect of the change involved outside employment. The effect was more than de minimis. Therefore, a duty to bargain existed. The Authority issued a cease-and-desist order.

Full Text

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The Respondent and the General Counsel filed briefs.*

The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally changing a bargaining unit employee's duty hours without first notifying the Union and providing it an opportunity to bargain over the impact and implementation of the change.

For the reasons stated below, we find that the Respondent committed the unfair labor practice alleged.

II. Facts

The American Federation of Government Employees, AFL-CIO (Union) is the exclusive representative of a nationwide consolidated unit of employees of the Department of Veterans Affairs (VA) that includes employees at the VA Medical Center, Phoenix, Arizona.

At all times relevant, John Hartzell, a bargaining unit employee, was employed in the Respondent's Urology Section as a licensed practical nurse. For at least the past five years, Hartzell worked from 7:00 a.m. to 3:30 p.m. On April 1, 1992, the Respondent's Chief of Urology sent Hartzell a memorandum advising him that beginning April 6, 1992, his daily tour of duty would be 8:00 a.m. to 4:30 p.m. The parties stipulated that the change in hours did not affect Hartzell's job responsibilities, rate of pay, or overall pay. The parties also stipulated, however, that in addition to his position with the Respondent, Hartzell held a second job with work hours of 3:30 p.m. to 12:00 a.m.

The Respondent did not give the Union notice of the change in Hartzell's work hours. In addition, the Respondent refused to bargain concerning the impact and implementation of the change in Hartzell's work hours.

III. Positions of the Parties

A. Respondent

The Respondent asserts that the change in Hartzell's tour of duty constituted an exercise of a management right under section 7106 of the Statute. The Respondent further claims that the change did not give rise to a duty to bargain because "the impact upon the working conditions of the unit was no more than de minimis." Respondent's Brief at 3. In support of this position, the Respondent states that in determining whether the impact or reasonably foreseeable impact of the exercise of a management right is more than de minimis, the Authority has held that the totality of the facts and circumstances presented in each case must be examined.

In examining the facts and circumstances of this case, the Respondent claims that the change in Hartzell's work hours was de minimis for the following reasons: (1) the change in Hartzell's tour of duty involved only a one hour difference; (2) there were no changes in the days worked on the weekly tour of duty or the number of hours worked; (3) Hartzell's duties remained the same; (4) there were no changes to Hartzell's office space or location; and (5) Hartzell suffered no loss in benefits or wages. Further, the Respondent argues that the change affected only one person in a nationwide bargaining unit and was a change "back to the standard tour of duty[.]" Id. at 4. Based on these factors, and noting particularly "the overall limited nature of the change in tour of duty," the Respondent argues that the impact or reasonably foreseeable impact of the change on conditions of employment was de minimis. Id.

Additionally, the Respondent asserts that "[t]he Charging Party has made unsupported allegations of interference with outside employment, the impact of which is not known and not reasonably foreseeable." Id. at 5. The Respondent argues that this case is distinguishable from Veterans Administration Medical Center, Prescott, Arizona, 46 FLRA 471 (1992) [92 FLRR 1-1357] (VA Prescott), in which a change in employees' work days had an effect that was reasonably foreseeable at the time the change was made.

Finally, the Respondent states that a finding that the change in Hartzell's tour of duty had no more than a minimis effect would further the Statute's goal of an effective and efficient Government. However, if a violation is found, the Respondent argues that a status remedy would be inappropriate and would impair the efficiency and effectiveness of its operations. In this connection, the Respondent notes that Hartzell's employment was subsequently terminated "on unrelated disciplinary grounds." Respondent's Brief at 7.

B. General Counsel

The General Counsel asserts that under the standard enunciated by the Authority in Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986) [86 FLRR 1-1874] (SSA), the Respondent's change in Hartzell's work hours had more than a de minimis effect. Therefore, the General Counsel argues that the Respondent had a duty to bargain concerning the impact and implementation of its decision to change his hours of work.

In support of its position that the effect of the change was more than de minimis, the General Counsel asserts that the times at which employees report to work and complete their shifts "has a considerable impact on working conditions" particularly where, as here, "the change affected Hartzell's livelihood, his means of support." General Counsel's Brief at 5. The General Counsel disputes the Respondent's contention that the change was de minimis because it involved only one employee. According to the General Counsel, the Authority rejected a similar argument in SSA. The General Counsel also claims that there is no evidence to suggest that the change in Hartzell's work hours was simply "temporary in nature." Id.

Additionally, the General Counsel disputes the view that only actual impact suffered at the workplace can give rise to a finding that a change is more than de minimis. In this regard, the General Counsel

argues that the Authority has never limited its review of the effect of the exercise of a section 7106(b)(1) management right to that which has actually occurred or that which has occurred only at the workplace. Rather, the General Counsel maintains that "the type of impact experienced by . . . Hartzell was of the exact type which would be foreseeable under the circumstances, and which has been recognized as the type of foreseeable impact which may be suffered by employees when changes to tours of duty are implemented." Id. at 7. Consequently, the General Counsel argues that the Respondent was obligated to bargain in this case and that its unilateral implementation of the change violated the Statute.

As a remedy, the General Counsel requests that the Authority order the Respondent to cease and desist from the unlawful conduct. Additionally, the General Counsel requests that an appropriate notice be posted at the VA Medical Center in Phoenix.

IV. Analysis and Conclusions

For the following reasons, we find that the effect of the change in Hartzell's hours of work was more than de minimis. Consequently, the Respondent was obligated to notify the Charging Party and bargain with respect to the impact and implementation of the change. The Respondent's failure to do so constitutes a violation of section 7116(a)(1) and (5) of the Statute.

It is well established that in determining whether a change is more than de minimis, the Authority will carefully examine the

facts and circumstances presented in each case . . . . In examining the record, we will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.

As to the number of employees involved, this factor will not be a controlling consideration. . . . As to the size of the bargaining unit, this factor will no longer be applied.

SSA, 24 FLRA at 407-408. Moreover, where the appropriate inquiry involves an analysis of the reasonably foreseeable effect of a change in conditions of employment, such an analysis is based on what a respondent knew, or should have known, at the time of the change. See Portsmouth Naval Shipyard Portsmouth, New Hampshire, 45 FLRA 574 (1992) [92 FLRR 1-1228].

Applying these principles to the instant case, the record establishes that the change in Hartzell's tour of duty had more than a de minimis effect, thereby giving rise to a duty to bargain. Significantly, when the Respondent changed Hartzell's hours of work from 7:00 a.m.-3:30 p.m to 8:00 a.m.-4:30 p.m., Hartzell could not report to his second job, which began at 3:30 p.m. Thus, there was an actual effect on Hartzell's conditions of employment as a result of the 1-hour change in his tour of duty. In addition, it was reasonably foreseeable that the change in the tour of duty could affect Hartzell's outside activities and impair his ability to satisfy prior commitments. Consequently, we reject the Respondent's assertion that the effect of the change was not reasonably foreseeable. Further, the Respondent's unilateral change in work hours directly affected Hartzell's livelihood. In this connection, the Authority previously has found that changes in working conditions that resulted in loss of employee compensation gave rise to a bargaining obligation. See, for example, Department of the Air Force, Nellis Air Force Base, Nevada, 41 FLRA 1011, 1017-18 (1991) [91 FLRR 1-1359] (agency was required to bargain over the impact and implementation of a change in employees' shift assignments that resulted, among other things, in the loss of a shift differential); Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532, 544 (1988) [88 FLRR 1-1416], aff'd National Association of Government Employees, Local R7-23 v. FLRA, 893 F.2d 380 (1990) [90 FLRR 1-8045] (agency was obligated to bargain over the impact and implementation of a change in an employee's hours of work that resulted

in the permanent loss in pay of about $2000 per year). Consequently, we conclude that the Respondent was obligated to bargain in this case.

We are not persuaded that there was no bargaining obligation in this case because the effect of the change involved outside employment. As noted by the General Counsel, the effect of changes on bargaining unit employees need not be limited only to those experienced in' the workplace. See, for example, Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 39 FLRA 1357, 1372 (1991) [91 FLRR 1-1148] (the reasonably foreseeable effects of a change in the amount of time spent participating in training exercises could involve an employee's family, travel, and/or educational plans). Additionally, we reject the Respondent's contention that the change was no more than de minimis because, in part, it involved only one employee. As we stated in SSA, the number of employees involved is not a controlling consideration.

Further, we reject the Respondent's assertion that VA Prescott is distinguishable from this case. In VA Prescott, the agency unilaterally changed employees' tours of duty by changing the days of the week that the employees were required to report. In finding that the agency was obligated to bargain over the impact and implementation of the change, the Authority stated the following:

In our view, if an agency changes the days on which an employee is required to report to work as part of the employee's regularly established weekly tour of duty, that change clearly has more than a de minimis effect on the employee's working conditions which is reasonably foreseeable at the time the agency makes the change. Moreover, if an agency makes such a change, it should also reasonably foresee that its action will disrupt responsibilities and commitments that the employee has made predicated on the previously scheduled days off.

46 FLRA at 475. Although the case addressed a change in an employee's weekly tour of duty, we find that the rationale is equally applicable to a change in an employee's daily tour of duty. Moreover, and consistent with VA Prescott, we find that the effect on Hartzell's working conditions was reasonably foreseeable at the time the change was made.

Accordingly, we conclude that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain over the impact and implementation of the decision to change Hartzell's work hours. To remedy the violation, the General Counsel has requested a cease and desist order. We agree that such an order is appropriate in this case.

V. Order

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Veterans Administration Medical Center, Phoenix, Arizona shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in the working conditions of bargaining unit employees by changing an employee's duty hours without first notifying the American Federation of Government Employees, Local 2382, AFL-CIO, the exclusive bargaining representative of certain of its employees, and affording such bargaining representative an opportunity to bargain concerning the procedures management will observe in exercising its authority to change unit employees' duty hours and appropriate arrangements for unit employees adversely affected by such changes.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Veterans Administration Medical Center, Phoenix, Arizona, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where

notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

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* The General Counsel also filed a motion to strike those portions of the Respondent's brief in which the Respondent incorrectly refers to an employee as a registered nurse. Noting particularly the absence of any opposition, we grant the General Counsel's motion.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in the working conditions of bargaining unit employees by changing an employee's duty hours without first notifying the American Federation of Government Employees, Local 2382, AFL-CIO, the exclusive bargaining representative of certain of our employees, and affording such bargaining representative an opportunity to bargain concerning the procedures management will observe in exercising its authority to change unit employees' duty hours and appropriate arrangements for unit employees adversely affected by such changes.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____

(Authority)

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California, 94103 and whose telephone number is: (415) 744-4000.

